Nos. 4, 5, 24

DEC 22 1966

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

CASCADE NATURAL GAS CORPORATION, *Appellant*

v.

EL PASO NATURAL GAS COMPANY and
UNITED STATES OF AMERICA

PEOPLE OF THE STATE OF CALIFORNIA, *Appellant*

v.

EL PASO NATURAL GAS COMPANY and
UNITED STATES OF AMERICA

SOUTHERN CALIFORNIA EDISON COMPANY, *Appellant*

v.

EL PASO NATURAL GAS COMPANY and
UNITED STATES OF AMERICA

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

BRIEF OF EL PASO NATURAL GAS COMPANY

GREGORY A. HARRISON
111 Sutter Street
San Francisco, California 94104

Attorney for Appellee El Paso Natural Gas Company

Of Counsel

ATHERTON PHLEGER
ROBERT S. DAGGETT
DAVID F. MACKIE
BROBECK, PHLEGER & HARRISON

LEON M. PAYNE
ANDREWS, KURTH, CAMPBELL & JONES

DENNIS MCCARTHY
VAN COTT, BAGLEY, CORNWALL
and MCCARTHY

SUBJECT INDEX

	Page
I Jurisdiction	2
II Question Presented	2
III Summary of Argument	3
IV The Context in Which These Appeals Were Taken: A Summary of This Nearly Ten Year Old Litigation	5
A. Preparation of the Divestiture Plan	6
B. Nature of the Plan for Divestiture	8
1. Division of Properties	10
2. The Divestiture Feature	12
C. The Plan Ultimately Agreed to Between the Parties and Approved by the District Court	12
D. Proceedings Subsequent to Entry of the Stipulated Divestiture Decree	16
V Argument	19
A. No Appellant Is Entitled to Intervene	19
B. Appellants Ought Not to Be Entitled to Obtain Review of the Stipulated Decree	26
C. Appellants' Complaints Respecting the Decree Are Without Substance	31
1. The Claim That El Paso Should Be Divested of Additional Gas Supplies in the San Juan Basin	32
2. The Claim That El Paso Should Contribute Additional Capital to Northwest	38
(a) Westcoast Transmission Company Stock	39
(b) Tax Losses	40
3. The Claim That Two Contracts Between El Paso and Northwest Should Be Revised	41
(a) San Juan Gathering Agreement	41
(b) The Kingsgate Contract	43

Page

4. The Claims Respecting Independence of Northwest and Its Management 44
   (a) Independence of Ownership 45
   (b) Independence of Northwest's Management 47
5. The Claim That the Decree Unduly Delays Divestiture 49

VI Conclusion 50

TABLE OF AUTHORITIES CITED

Cases	Pages
Allen Co. v. Cash Register Co., 322 U.S. 137	2, 4, 24
Alliegro v. Pan American Bank of Miami, 136 So.2d 656, aff'd. 149 So.2d 45 (Fla.)	41
Basle Theatres, Inc. v. Warner Bros. Pictures Dist. Corp., 24 F.R.D. 476 (W.D. Pa.)	25
California v. Federal Power Commission, 369 U.S. 482	5
Case v. New York Central Railway Company, 19 A.D.2d 383, 243 N.Y.S.2d 620	41
Continental Co. v. United States, 259 U.S. 156	3, 13, 27, 28, 45
El Paso Natural Gas Co. v. F.P.C., 281 F.2d 567 (5 Cir.), cert. den. 366 U.S. 912	38
Reynolds Metals Co. v. F.T.C., 309 F.2d 223 (D.C. Cir.)	34
Sam Fox Publishing Co. v. United States, 366 U.S. 683	2, 3, 4, 20, 24
Schine Theatres v. United States, 334 U.S. 110	34
Sutphen Estates v. United States, 342 U.S. 19	2, 4, 21, 24, 28, 36
Swift & Co. v. United States, 276 U.S. 311	28, 29, 30
United States v. Borden Co., 347 U.S. 514	23
United States v. California Cooperative Canneries, 279 U.S. 553	2
United States v. du Pont & Co., 366 U.S. 316	3, 25, 26, 27, 28, 34
United States v. El Paso Gas Co., 376 U.S. 651	2, 6, 36, 37
United States v. Paramount Pictures, 334 U.S. 131	4, 23
United States v. Radio Corporation of America, 186 F. Supp. 776 (E.D. Pa.), appeal dismissed *sub nom.* Westinghouse Broadcasting Company v. United States, 364 U.S. 518	2, 4
Western Pac. R.R. Company v. Western Pac. R. Corp., 197 F.2d 994 (9 Cir.), rev'd on other grounds, 345 U.S. 247, reh. den. 206 F.2d 495, cert. den. 346 U.S. 910	41

STATUTES AND RULES

	Pages
Delaware Corporations Code, Section 259	6
Federal Rules of Civil Procedure:	
Rule 24	20
Rule 24(a)	3, 20, 24
Rule 24(b)	20
Rule 24(c)	25
Natural Gas Act (15 U.S.C. Section 717-717w)	18, 49
Section 7	5
United States Code:	
15 U.S.C. Section 18 (Clayton Act)	4, 6, 23, 25, 36
15 U.S.C. Section 25	4, 23, 25
15 U.S.C. Section 26	25
15 U.S.C. Section 29 (Expediting Act)	2, 3, 20

TREATISES

Moore's Federal Practice, Vol. 4, para. 24.09	24
Moore's Federal Practice, Vol. 4, para. 24.13	25

In the Supreme Court of the United States

OCTOBER TERM, 1966

Nos. 4, 5, 24

CASCADE NATURAL GAS CORPORATION, *Appellant*

v.

EL PASO NATURAL GAS COMPANY and
UNITED STATES OF AMERICA

PEOPLE OF THE STATE OF CALIFORNIA, *Appellant*

v.

EL PASO NATURAL GAS COMPANY and
UNITED STATES OF AMERICA

SOUTHERN CALIFORNIA EDISON COMPANY, *Appellant*

v.

EL PASO NATURAL GAS COMPANY and
UNITED STATES OF AMERICA

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

BRIEF OF EL PASO NATURAL GAS COMPANY

El Paso Natural Gas Company submits this single brief as appellee in these consolidated appeals from orders denying appellants' petitions to intervene in the antitrust relief proceedings below.[1]

---

1. The brief of appellant Cascade Natural Gas Corporation ("Cascade") is cited here "Cascade Br. ....."; the brief of William M. Bennett, who styles himself "Special Counsel for the People of the State of California" is cited "Bennett Br. ....."; and the brief of appellant Southern California Edison Company ("Edison") is cited "Edison Br. .....".

Emphasis in quoted matter has been supplied.

I

JURISDICTION

Contrary to appellants' submissions (Cascade Br. 2; Bennett Br. 2; Edison Br. 2), El Paso contends that none of the appellants was entitled to intervene in the district court, and that the appeals should therefore be dismissed for lack of jurisdiction.

Expediting Act, 15 U.S.C. § 29;
United States v. California Cooperative Canneries, 279 U.S. 553;
Allen Co. v. Cash Register Co., 322 U.S. 137;
Sutphen Estates v. United States, 342 U.S. 19;
Sam Fox Publishing Co. v. United States, 366 U.S. 683; and
United States v. Radio Corporation of America, 186 F.Supp. 776 (E.D. Pa.), appeal dismissed *sub nom. Westinghouse Broadcasting Company v. United States*, 364 U.S. 518.

II

QUESTION PRESENTED

Each appellant contends (Cascade Br. 4; Bennett Br. 3; Edison Br. 3) that the questions for decision are (1) whether the stipulated decree for divestiture approved by the district court and entered below complies with the mandate of this Court in *United States v. El Paso Gas Co.*, 376 U.S. 651, (2) whether appellants were entitled to intervene as of right in the relief proceedings taken in obedience to the mandate, and if not (3) whether appellants

should have been granted permissive intervention in the discretion of the district court.

El Paso submits that the only question for review here is whether appellants were entitled to intervene as of right under Federal Rule 24(a). Denial of permissive intervention is not reviewable in an Expediting Act case, *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 688, and if appellants had no right to intervene they are not entitled, we submit, to obtain review of the stipulated decree. Cf. *United States v. du Pont & Co.*, 366 U.S. 316; *Continental Co. v. United States*, 259 U.S. 156.

III

SUMMARY OF ARGUMENT

Review here begins and ends with the question whether any appellant was entitled to intervene below as of right. If any appellant was entitled to the status of a party, the stipulated divestiture decree is a nullity and there is nothing before the Court to review. If none of the appellants had a right to intervene, their complaints about the decree are not before the Court "in any proper way", *Continental Co. v. United States*, 259 U.S. 156, 166, because there is no controversy between the parties on which appellate jurisdiction could rest.

Appellants had no right to intervene under Federal Rule 24(a). None will be "bound" by the decree within the meaning of the Rule, none has any interest in the properties to be divested or claims any injury to its own property, and none is entitled to claim that the United States has inadequately represented the public interest in the proceedings.

In an unbroken line of authorities this Court has uniformly denied claims of a right to intervene in government antitrust litigation asserted by private third parties. Intervention has been denied, for example, to a competitor of a company sought to be acquired by an antitrust defendant as against a consent decree,[2] to members of a class who claim that relief obtained by the government was inadequate to protect their interests,[3] and to a party claiming under a contract with a defendant being reorganized for antitrust purposes.[4] Appellants here claim no injury to any private interest or property. Each seeks to supersede the United States in enforcing Section 7 of the Clayton Act (15 U.S.C. § 18) and the divestiture mandate of this Court upon the claim that the public interest has been inadequately represented and that the decree rendered represents inadequate antitrust relief. Representation of the public interest in enforcement of Section 7 by the Attorney General is adequate as a matter of law. No private party may intervene in such a case upon a claim that he is entitled to represent the public.

Although appellants are not entitled to review of the stipulated decree, we are compelled to respond to their attacks on the terms of the decree. Even if the decree were to be reviewed, it fully complies with the divestiture mandate.

The decree creates a new corporation to replace the former Pacific Northwest Pipeline Corporation with gas

---

2. *Allen Co. v. Cash Register Co.*, 322 U.S. 137; *United States v. Radio Corporation of America*, 186 F. Supp. 776, appeal dismissed, 364 U.S. 518.

3. *Sam Fox Publishing Co. v. United States*, 366 U.S. 683; *United States v. Paramount Pictures*, 334 U.S. 131.

4. *Sutphen Estates v. United States*, 342 U.S. 19.

supplies and other assets far greater than those enjoyed by the old Pacific Northwest, and with a sounder capital structure and prospects for satisfactory current and future earnings in contrast to Pacific Northwest's anticipated losses. It will be more capable of serving the certificated natural gas markets of Pacific Northwest than was the acquired company. It is better equipped to compete for increments of new market demand in California and elsewhere.

We elaborate these points in turn, after summarizing the events which have brought the parties to this Court for the third time.

IV

THE CONTEXT IN WHICH THESE APPEALS WERE TAKEN: A SUMMARY OF THIS NEARLY TEN YEAR OLD LITIGATION

The government commenced this action in July of 1957 after El Paso acquired the stock of Pacific Northwest Pipeline Corporation. The Federal Power Commission then approved El Paso's acquisition of Pacific Northwest's assets, but this Court reversed a judgment of the Court of Appeals affirming the Commission's orders. *California v. Federal Power Commission*, 369 U.S. 482.

In holding that the Commission should have awaited decision of the antitrust case, the Court nevertheless recognized that the Commission's orders approving the asset merger rested upon a determination under Section 7 of the Natural Gas Act (15 U.S.C. § 717f) that the acquisition would serve the public convenience and necessity. The Court stressed, however, that the Commission's powers did not include jurisdiction to determine antitrust issues and that "the antitrust policy whose enforcement Congress in this situation has entrusted to the courts" was paramount. *Id.* at 490.

The antitrust case was then tried in obedience to the decision, after which a judgment against the government was reversed. This Court ordered "divestiture without delay" for the first time on an initial appeal on the antitrust merits. *United States v. El Paso Gas Co.*, 376 U.S. 651, 662.

A. Preparation of the Divestiture Plan.

Within days after this Court's order to divest, El Paso's principal executives called upon the Department of Justice to begin work on a divestiture plan (R. 827).

The task was without precedent. Never before had Section 7 of the Clayton Act been held applicable to acquisition of the facilities of one regulated pipeline company by another; never before had a pipeline company been required to divest itself of operating assets dedicated to public service. El Paso believed it was duty bound to prepare a feasible plan to comply with the divestiture mandate (R. 143, 835); the Attorney General looked to El Paso to present such a proposal (R. 43); it would have been extremely difficult, if not impossible, for any other party to do so, and no other party attempted to do so.

Preparation of such a plan involved a series of unique and difficult problems. The properties of El Paso and Pacific Northwest had been combined under a single ownership, Pacific Northwest had ceased to exist as a matter of corporate law, Del. Corp. Code § 259, and its management as such had vanished. Pacific Northwest's debt had been combined with El Paso's, so that all of El Paso's property, including the assets to be divested, had become subject to the lien of El Paso's mortgage pipeline bonds and subject to sinking fund debentures aggregating some $825,000,000 in face value (Def. Ex. A, R. 1847, in evidence R. 162).

Any plan for prompt divestiture of the assets El Paso acquired from Pacific Northwest required approval and assent of the 100 holders (R. 143-144; Def. Ex. A, R. 162, 1845-1847) of this secured debt. It was essential that the successor to Pacific Northwest's assets take them free of the security interests attaching to the properties El Paso was to retain, and it was no less important that El Paso be free of the lenders' interests attaching to the properties to be divested so that El Paso might continue to serve its own certificated markets.

In their planning to effect prompt compliance with the divestiture mandate, El Paso and the Department of Justice both acknowledged and realized that lenders' approval of any divestiture proposal would have to be obtained (R. 143, 663-665).

El Paso's officers were in close and continuing communication with representatives of the Antitrust Division throughout the spring, summer and fall of 1964 (R. 831-832) and with the knowledge and acquiescence of the Division they presented a plan of asset separation and debt realignment to the security holders (R. 143-144).

The district court ordered the parties to report upon their progress on July 8, 1964 (R. 36-37). The Department of Justice represented to the court that El Paso was pursuing efforts to effect prompt divestiture in good faith and that these efforts, although not yet in a final stage, justified the government in seeking a continuance to permit El Paso to submit its proposals for asset separation and debt realignment to the security holders (R. 43).

El Paso continued in these efforts and, after a further report to the district court on September 17, 1964 (R. 64-65, 832-833), a hearing on El Paso's proposal in open court was set for the following October 19 (R. 66-68).

When the hearing began the court had before it 20 petitions to intervene (R. 3 et seq.)[5] Counsel for the Federal Power Commission also were present. They sought leave for the Commission to participate *amicus curiae*, which was granted immediately by the district court with an expression of appreciation for the Commission's willingness to assist the court (R. 162-163).

The district court addressed itself to the petitioners to intervene and heard oral argument on the subject from numerous lawyers (R. 182-209). The court then invited each of the petitioners to submit a memorandum of law and evidence supporting its claim of a right to intervene (R. 204).

El Paso presented its divestiture proposal to the court (R. 137-176). The portions of the proposal relating to asset separation and debt realignment had by then been approved by El Paso's security holders (R. 144), and had also been, as we have said, under submission to the Antitrust Division since April of 1964 (R. 143). Government counsel asked for additional time to review the matter (R. 177), the district court reiterated its intention to examine the briefs still to be submitted by the petitioners to intervene (R. 208-209), and the hearings were continued to the following December 2 (R. 212).

B. Nature of the Plan for Divestiture.

The divestiture proposal, later incorporated *in part* in the stipulated decree, has been referred to by some as "El Paso's Plan" (Bennett Br. 11; Cascade Br. 9; Edison Br. 44). The proposal is more properly described as that of El

---

5. Edison, the twenty-first such petitioner, asserted no right to intervene until 8 months later, on the day the stipulated divestiture decree was entered (R. 2092) and some 6 months after denial of the 20 petitions filed earlier.

Paso and its security holders. The plan was divided into two distinct portions:

(1) *A division of assets, preparatory to divestiture, to segregate properties to be divested from assets El Paso would retain; and*

(2) *A method by which El Paso would divest itself of the assets to be divested.*

The nature of the assets to be divested was of no less importance to El Paso's security holders than an equitable realignment and division of the secured debt. The lenders had and have a vital interest in the continued capability of El Paso and the new owner and operator of the divested properties to serve their own certificated markets to the end that the assets and earnings of each company would be adequate to repay the debt of each.

The divestiture mandate required, of course, that El Paso divest itself of the assets it acquired from Pacific Northwest in the merger. But El Paso believed that literal compliance would not have been enough, since the new owner and operator of the divested properties would not be able to repay its debt and enjoy adequate earnings unless it were able to satisfy public demand for natural gas in the former Pacific Northwest's markets, a demand which had increased since the merger (R. 154; 174-175). El Paso accordingly proposed formation of a new corporation[6] to receive not only all the operating assets El Paso acquired from Pacific Northwest, *but also additional properties* to

---

6. Called "New Company" in the divestiture proceedings below (R. 140) and the stipulated divestiture decree (R. 2174). The corporation formed for this purpose was organized in Delaware as Northwest Pipeline Corporation (Def. Ex. S, R. 2099, 2134) and is referred to hereafter as "Northwest".

enable the new corporation, Northwest, to serve the certificated markets of the former Pacific Northwest.

1. DIVISION OF PROPERTIES.

The plan proposed by El Paso, and approved by the security holders with the acquiescence of the United States, gave to Northwest:

(1) *All* of the operating properties El Paso acquired from Pacific Northwest (R. 147-148, 630);

(2) *All* additions, extensions, betterments, and improvements of the acquired facilities which were provided by El Paso after the merger at a cost to El Paso of some $50,000,000 (R. 147-148, 630);

(3) A gasoline plant in the Wyoming area constructed at a cost to El Paso of some $9,500,000 (R. 148);

(4) *All* of the gas supplies El Paso acquired from Pacific Northwest (R. 149, 668);

(5) *In addition*, 285 billion cubic feet of San Juan reserves and all gas reserves located north of Ignacio, Colorado, obtained since the merger and connected to El Paso's Northwest division system, including the Rocky Mountain area which embraces the Big Piney Field in Wyoming (R. 149, 631, 668, 755);

(6) An additional $35,000,000 invested by El Paso in developing San Juan Basin properties formerly owned by Pacific Northwest (R. 669-670);

(7) *All* Canadian sources of gas supply the former Pacific Northwest had contracted for, or was in the process of contracting for, at the time of the merger (R. 149-150, 668) and *all* Canadian sources of gas acquired thereafter by El Paso at a cost to it of some $3,500,000 (R. 150, 630); and

(8) A contract with El Paso for continuance of joint gathering of gas in the San Juan Basin to eliminate

need for Northwest to build costly duplicate gathering facilities, at a gathering charge less than El Paso's cost of service which will be subject to regulation by the Federal Power Commission (R. 157-160, 616-621, 724).

The total quantity of gas supplies just mentioned is three trillion cubic feet more than the supplies possessed by Pacific Northwest at the time of the acquisition. After taking into account depletion of reserves dedicated to serving the northwest markets since the acquisition—amounting to 1.3 trillion cubic feet—Northwest will receive a net increase in gas supplies of 1.7 trillion cubic feet (R. 670, 696). Its gas supplies will have a deliverability life equal to the deliverability life of the supplies to be retained by El Paso (R. 152-153).

The utility plant to be transferred to the new corporation has an undepreciated cost of three hundred and thirty-five million dollars and a net value after depreciation of two hundred sixty-eight million dollars (Def. Ex. A, R. 162, 1472-1473) subject to one hundred eighty million dollars of debt (Def. Ex. A, R. 162, 1836).

The contract to be assigned to Northwest under which it will purchase Canadian gas delivered at Kingsgate, near the Canadian border, requires El Paso for a reasonable time to purchase gas delivered thereunder in excess of Northwest's market needs (R. 160-162, 626-627).[7]

---

7. In February of this year El Paso contracted with Westcoast Transmission Company for an additional 300,000,000 cubic feet per day of gas, and an option on a like daily quantity, to be divested to Northwest in addition to the supplies just enumerated. The Federal Power Commission, at Docket CP66-315, granted El Paso's application for a temporary certificate to construct facilities for importation of the first one hundred million cubic feet per day of gas under contract. Those facilities have been completed by El Paso at a cost of six million dollars.

These are the principal features of the portion of El Paso's divestiture proposal relating to division and segregation of assets. Modification of any substantial feature of that portion of the plan would have vitiated the approvals given by El Paso's security holders.

2. THE DIVESTITURE FEATURE.

This portion of El Paso's proposal was concerned with divestiture by El Paso and the time within which it would be required to do so.

El Paso proposed that it be allowed to divest itself of stock in Northwest to El Paso's shareholders by spin-off, issuance of rights to subscribe or some combination of those or other traditional methods (Def. Ex. A, R. 162, 1837-1838). El Paso also proposed to divest itself of stock it had acquired in the merger in Westcoast Transmission Company, a Canadian natural gas company, by sale of Westcoast shares to a purchaser or purchasers approved by the district court after notice to the United States (*Id.*, R. 1836). Under this phase of the plan, approval of the Department of Justice and the district court would be required for the appointment of an independent Northwest management (*Id.*, R. 1842). El Paso asserted that its own stock was so widely distributed as to preclude any possibility that the proposed spin-off would result in a community of interest between the two companies (R. 175-176).

C. The Plan Ultimately Agreed to Between the Parties and Approved by the District Court.

In the divestiture hearings below, the Department of Justice took exception for a time to El Paso's proposal for

division and segregation of assets between itself and Northwest.[8]

While counsel for El Paso and the Department of Justice were litigating their respective claims in the district court, they were engaged at the same time in negotiations for settlement. Out of these discussions came a stipulated decree. It gave effect to the division of assets originally proposed by El Paso and approved by its security holders. But El Paso's plan for divestiture of stock in Northwest by spin-off, the crucial feature for antitrust purposes, *was totally rejected in the decree.* Instead, the decree required divestiture of the stock by a method paralleling that approved by this Court in *Continental Co. v. United States,* 259 U.S. 156, in connection with divestiture of the Reading Railroad coal interests, or by sale to the public. This was conceived and insisted upon by the *Department of Justice.* This change in El Paso's proposal was of little importance to its security holders.

The differences between El Paso's proposal and the requirements of the decree to which El Paso submitted may be summarized graphically as follows:

---

8. Prior to agreement on the divestiture decree, counsel for the government had advanced either evidence or arguments supporting contentions also made by appellants and certain other petitioners to intervene. These contentions were: (1) that El Paso should be required to divest itself of additional gas supplies in San Juan Basin (R. 1426-1433); (2) that El Paso should be ordered to gather gas in the San Juan Basin for Northwest at a charge of about one-fourth El Paso's cost (R. 1436); (3) that El Paso should contribute additional non-operating capital to Northwest in the form of its stock in Westcoast Transmission Company and a further amount represented by claimed tax savings (R. 1437-1441); and (4) that El Paso should commit itself to take or pay for all Canadian gas, without limitation as to time or quantity, to be delivered to Northwest at Kingsgate which Northwest elected for any reason not to purchase (R. 1434-1436).

El Paso Proposed	Decree Requires
Distribution of stock in Northwest to El Paso's own shareholders—	El Paso must divest itself of all shares in Northwest received by it in return for the properties to be divested, within three years after the stock is received—
1. By spin-off (Def. Ex. A, R. 162, 1837);	1. Within 18 months after receipt of Northwest shares, El Paso may distribute at least 80% of them in exchange for shares of El Paso common, but no El Paso shareholder exchanging his shares for Northwest stock may own any shares in El Paso immediately after the exchange. (R. 2175).
2. Sale or other issuance of rights to subscribe or	2. Any of El Paso's shares in Northwest not exchanged in this fashion must be sold within the three-year period to the public, but no holder of more than one-half of 1% of El Paso's own shares shall purchase any Northwest stock from El Paso (R. 2176), and
3. Any combination of these methods. (*Id.*, R. 1838).	3. Sale of Northwest shares to the public must be through an underwriter or underwriters approved by the court after notice to the Department of Justice (R. 2176).
There would be no restriction on common ownership of El Paso and Northwest stock.	Pending divestiture of Northwest shares acquired by El Paso in exchange for assets, Northwest's chief executive officer, selected by the parties and approved by the district court, shall hold the Northwest shares as trustee subject to the jurisdiction of the district court (R. 2174).

El Paso is required by the decree to transfer the properties to be divested to Northwest "promptly" (R. 2175) after issuance of the necessary certificates and authorizations (R. 2175), and to transfer its stock in Northwest obtained in exchange for the properties "forthwith" (R. 2176) to Northwest's chief executive officer as voting trustee (R. 2176-2177), who is subject in that capacity to continuing control of the district court (R. 2174). As a consequence, El Paso will be fully divested of any power to control the *assets* prior to divestiture of its Northwest *stock* as quickly as regulatory approval can be obtained.

The decree also requires El Paso to divest itself of its stock in Westcoast Transmission Company by a sale to a person or persons approved by the district court after notice to the United States (R. 2176).

The decree enjoins El Paso from acquiring any stock or financial interest whatever in Northwest after the stock divestiture (R. 2177). It enjoins El Paso for 10 years after the entry of the decree from acquiring or holding *any* natural gas transmission properties in the United States or *any* capital stock of *any* person engaged in the natural gas transmission business in the United States, except with approval of the Antitrust Division or after establishing to the satisfaction of the district court, after notice to the United States, that the effect of such an acquisition will not be to substantially lessen competition or tend to create a monoply (R. 2177). It enjoins El Paso from having any officer or director who is also an officer, director or employee of Northwest *or* who owns, or whose family owns, more than one-tenth of one percent of Northwest's stock (R. 2177-2178). It enjoins El Paso for 5 years after Northwest starts service from hiring any Northwest employee without Northwest's written consent (R. 2178). It requires El Paso to permit Antitrust Division attorneys access to El Paso's books and records relating to matters contained in the decree and access to El Paso's officers and employees for that purpose (R. 2178). It requires El Paso to report in writing to the Antitrust Division upon matters controlled by the decree (R. 2178) and until completion of the stock divestiture to report to the district court at six month intervals on its progress in complying with the decree (R. 2176).

We think this shows that appellants' charges that the Department of Justice agreed to a divestiture conceived and

proposed by El Paso (Bennett Br. 11, Cascade Br. 9, Edison Br. 44) are, to put it bluntly, false. The decree provisions for divestiture itself were conceived, insisted upon and sponsored by counsel for the United States and they bear no resemblance to the form of divestiture proposed by El Paso.

When the agreed decree was presented to the district court for its approval, the Second Assistant Attorney General in the Antitrust Division made the following representations in open court (R. 2132):

> *"The decree submitted to the Court with the consent of the Government, in our judgment, will carry out the mandate of the Supreme Court.* And your Honor will recall the principal objection we made to the plan of divestiture orginally proposed by El Paso was that it would not insure the complete economic separation between the two companies. And we feel the decree now before your Honor accomplishes that essential objective of the Department of Justice in that the ownership of the two companies will not be the same, that the court-appointed trustee and the chief executive officer and independent management will be separate and independent from El Paso as far as we have been able to ascertain, and we make it clear that we have talked to *all three of the gentlemen* who will serve as officers, and we have confidence in their integrity and their independence; and, on balance, we would like to say that the decree in our judgment would carry out the mandate of the Supreme Court, and, under the circumstances, we feel it is necessary that the case get on and get completely disposed of as soon as possible."

D. Proceedings Subsequent to Entry of the Stipulated Divestiture Decree.

In pursuance of Section IV (A) of the decree (R. 2174), the district court, on June 24, 1965, approved the appoint-

ment of Mr. Glenn W. Clark as Chief Executive Officer of Northwest and election of other individuals to serve as officers and members of Northwest's board of directors (R. 2179-2180). Mr. Clark is a seasoned senior executive in the gas pipeline industry, as are his associates in Northwest (R. 2182-2183). He has never had any association or connection with El Paso (R. 2102-2104). Mr. Clark's appointment as Northwest's chief executive had been under consideration by the district court for some time prior to its approval of his appointment (R. 2103). He had been proposed for this position after having been interviewed by the Department of Justice (R. 2115, 2132, see 639), and the Antitrust Division had been assured of not only his complete independence of El Paso's influence but also of his intention to have Northwest compete in expanding markets for natural gas, including California (R. 2115).

The district court permitted counsel for all the would-be intervenors in attendance to cross-examine Mr. Clark. Counsel for Edison and the Oregon public utilities commissioner did so at length (R. 2113-2115). No one voiced objection (R. 2117-2131). Counsel for the United States examined and elicited from Mr. Clark testimony that he had engaged in a "number of discussions with representatives of the Department of Justice in connection with [his] duties", that he would operate Northwest in a manner "completely independent" of El Paso influence, and he would expect "to compete in expanded markets for the sale of natural gas including the State of California." (R. 2115). The district judge also examined Mr. Clark (R. 2103-2105, 2115-2116).

The district court approved Northwest's certificate of incorporation and by-laws the same day (R. 2186-2187). These instruments provided, in conformity with an agree-

ment between the parties, that the first meeting of Northwest stockholders to elect successors to the original directors approved by the district court shall not be held until April of 1969 (R. 2154). The purpose of this feature was to preclude any possibility that El Paso could influence election of successor directors if the terms of the initial directors should expire before El Paso had divested itself it its stock in Northwest. The by-law provisions were an assurance of independence over and above the decree requirement that Mr. Clark hold and vote all of El Paso's Northwest stock before divestiture (R. 2100).[9]

On July 23, 1965, El Paso and Northwest filed applications with the Federal Power Commission, at Dockets CP66-27, CP66-28, CP66-29 and CP66-30, pursuant to Section IV (B) of the decree (R. 2174). The applications sought Commission approval under the Natural Gas Act for El Paso's transfer of the properties to be divested to Northwest and operation of the properties by Northwest in service of its markets. These proceedings were prosecuted vigorously until June of this year. On June 27 the Commission entered an order staying further proceedings on the applications until determination of these appeals.

The parties appeared before the district court and made reports concerning their progress in carrying out the decree, pursuant to its Section IV (G) (R. 2176), on January 31, 1966 and again on August 4, 1966. Counsel for Northwest appeared on each occasion.[10]

---

9. Cascade misunderstands the by-law requirements as a sinister effort to perpetuate the original Northwest directors in office (Cascade Br. 30), apparently because Cascade did not appear at the hearing (R. 2087-2088) at which the agreed purpose was explained (R. 2100).

10. Transcript of proceedings in the district court on January 31, 1966, p. 3, and on August 4, 1966, p. 9. The reporter's tran-

At the January 31 hearing the parties informed the district court of the filing of applications by El Paso and Northwest with the Federal Power Commission in July of 1965, and reported on the posture of the Commission proceedings, to which El Paso and Northwest had by then devoted substantial effort (Tr. 4-7). At the proceedings on August 4 the district court was informed of the stay order entered by the Commission in June (Tr. 5-6), and El Paso reported on its contract with Westcoast Transmission Company for an additional 300 million cubic feet of gas a day for service of the northwest markets and its option on a like quantity (Tr. 6-7; *supra*, n. 7).

V

ARGUMENT

A. No Appellant Is Entitled to Intervene

As we have said, twenty petitions to intervene were filed in the district court from time to time after the divestiture mandate went down and before the stipulated decree was entered (R. 3 *et seq.*). Edison, the twenty-first petitioner, claimed the status of a party on the day the decree was entered (R. 2092).

The petitioners included Mr. Bennett, the public utilities commissions of seven states including California, eleven gas distributing companies, a corporation which had never engaged in the natural gas pipeline business

---

scripts of the two district court hearings held after entry of the stipulated decree have been filed with the Clerk. The transcripts are not included in the printed record, but appellants and appellees have stipulated, in an instrument filed with the Clerk in June, that the parties to these appeals may refer in their briefs to any portion of the record on file with the Clerk which has not been printed. We cite the transcripts hereafter "Tr. ....."

but wished nevertheless to purchase and operate the properties to be divested, and Edison, an industrial consumer of natural gas as boiler fuel.

Of these, but three have appealed. If Mr. Bennett is entitled to intervene, then so is the public utilities commission of every State along the El Paso system; if Cascade has that right, then so does every gas distribution company on the system; and if Edison is entitled to be a party, then so is every other similarly situated consumer of natural gas.

Appellants base their claim of a right to intervene on Federal Rule 24. Only Rule 24(a), and the decisions of this Court construing it, are involved.[11] Under the Rule as in force at all time pertinent to these appeals[12]

---

11. Despite appellants' contrary claims, no question of permissive intervention under Rule 24(b) is before the Court, for it has always been held that orders denying permissive intervention in Expediting Act cases are not reviewable at all. *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 688, and authorities cited.

12. Amendments to the rule became effective July 1, 1966. Edison says the amended rule applies here because it is procedural, does not "infringe vested rights" and was "adopted with no expressed intention of excluding its applicability to litigants involved in pending cases." (Edison Br. 39) Cascade echoes this contention (Cascade Br. 39-40).

Paragraph 2 of the order adopted on February 28, 1966, for transmission of the amended rules to Congress states that the amendments shall apply "in actions brought" after July 1, 1966, and in further proceedings in actions then pending unless this "would not be feasible or would work injustice." 384 U.S. 1031.

Appellants' petitions to intervene were all denied and the stipulated decree was entered before amended Rule 24 took effect. Surely it would be both infeasible and unjust to test the orders of the trial court under a standard which was not in effect when they were entered.

Apart from that, the discussion of former Rule 24 in the text which follows demonstrates, we believe, that appellants would have no better right to intervene under the amended rule than under the rule which was in force when their petitions were filed and denied.

each appellant had the burden of showing an "interest" inadequately represented by the United States and that it might be "bound" by the judgment, or that it had an interest in property subject to disposition by the district court, *and* that the interest thus established would be *"adversely affected"* or *injured* (*Sutphen Estates v. United States*, 342 U.S. 19).

The "interests" asserted by appellants are wholly different from what they would intervene to protect. Mr. Bennett points to California's "gas consumers" whom he claims to represent (Bennett Br. 2); Cascade's claim rests upon an admittedly "private" interest as a purchaser of gas for resale from the new corporation established pursuant to the decree (Cascade Br. 5, 12); and the interest asserted by Edison is that of a Southern California industrial consumer of gas (Edison Br. 39). There is no claim that *these* interests have been injured or affected at all. Mr. Bennett does not claim that the divestiture plan contained in the decree will interfere with California's gas supply; Cascade does not deny that the new company will be better able to serve Cascade than Pacific Northwest;[13] and Edison does not allege that its present supply of natural gas for boiler fuel is affected.

Instead each appellant claims a right to intervene to supplant the Attorney General for the sole purpose of protecting the public interest in obtaining adequate *antitrust* relief and enforcing the mandate. Each states in its brief that the *first* issue here is whether the decree complies with the mandate (Bennett Br. 3; Cascade Br. 4; Edison

13. Cascade *admits* that Northwest has *"sufficient"* reserves to be certificated by the Federal Power Commission, that its capital structure is adequate under Commission standards, and that Northwest otherwise *satisfies* Commission requirements (Cascade Br. 13, 42).

Br. 3), that the intervention issue is either subservient or unrelated, and none claims that any other interest or consideration supports its claim of right to intervene. Mr. Bennett, "regardless of the position of California" (Bennett Br. 12), would represent "the interest of the public which is paramount here" (p. 18) in seeing that "the mandate of this Court be respected" (p. 12). Cascade, admitting that its only "interest" is "private" (Cascade Br. 5, 12), seeks only to put El Paso "back in the position where it was prior to the time it illegally acquired Pacific" so that divestiture will insure that "the shoe will be pinching the proper foot." (Cascade Br. 35). Cascade also cautions against "putting the public service cart before the anti-trust horse" (p. 27). Edison, whose brief apparently is adopted by Mr. Bennett (Bennett Br. 15), similarly confines itself to the claim that it only seeks to "establish New Company [i.e., Northwest] as a viable competitor in the California gas markets" (p. 42).

These are not fragmentary extracts from appellants' briefs; they illustrate what thorough analysis of each brief shows, *viz.*: that each appellant restricts the ground for its intervention to a claim of right to represent and litigate the public interest in antitrust relief and that none claims any injury to a private interest different from that of the public.

This is not a case in which a property owner, contract party or competitor seeks to intervene upon a claim that antitrust relief obtained by the United States has resulted in unreasonably oppressive harm to a legally protected private interest. Whether there will ever be a case in which such a claim might be entertained is beside the point. The issue here is the different question whether a private party claiming to be dissatisfied with antitrust relief obtained by the United States may intervene in a government case to

supplant the Attorney General and litigate his own conception of what the public interest requires.

We submit that representation of the public interest in Section 7 cases by the Attorney General is adequate as a matter of law. The Attorney General has sole power to represent the United States in proceedings in the district courts to prevent and restrain violations of the Clayton Act (15 U.S.C. § 25). The Court held in *United States v. Borden Co.*, 347 U.S. 514, 518-519, where the United States had been denied an injunction simply because a private litigant had already obtained an order of the same type prayed for by the Attorney General, that:

> "The private-injunction action, like the treble-damage action under § 4 of the Act, supplements government enforcement of the antitrust laws; *but it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws.* The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. . . .
>
> "It is also clear that Congress did not intend that the efforts of a private litigant should supersede the duties of the Department of Justice in policing an industry."

With respect to intervention, it was held in *United States v. Paramount Pictures*, 334 U.S. 131, 177, that:

> "The Department of Justice is the representative of the public in these antitrust suits. *So far as the protection of the public interest in free competition is concerned, the interests of those* [would-be] *intervenors was adequately represented.*"

Recognizing that government antitrust cases are often "of large public interest," the Court has nevertheless held

that "a multitude of such interventions may result in accumulating proofs and arguments without assisting the court." *Allen Co. v. Cash Register Co.*, 322 U.S. 137, 141-142. Antitrust requirements are paramount to the numerous other concerns and interests third parties might wish to advance, *Sutphen Estates v. United States*, 342 U.S. 19, and "sound policy" precludes intervention in a government antitrust case by one who disputes the wisdom of the Attorney General in agreeing to a relief decree, "at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting." *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689.

Apart from the adequacy of the Attorney General's representation of the United States, none of the appellants will be "bound" by the decree within the meaning of Federal Rule 24(a) in respect of its private interests. Mr. Bennett and Edison claim no legal interest or right other than antitrust enforcement. Cascade has a contract for purchase of gas. Aside from the fact that Cascade does not claim any impairment of contract rights and admits that Northwest meets gas reserve and other Federal Power Commission requirements for certification (Cascade Br. 13, 42), any rights it may have now or in the future will continue to be enforceable. For as held in *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689:

> "We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it."[14]

14. No appellant has or could assert any legal interest in the properties to be divested. Professor Moore analyzes the authorities as holding uniformly that a property interest, to support intervention, must rise to the level of "a lien, equitable or legal," or some similarly protectible interest. (4 Moore's Federal Practice, Para. 24.09, p. 45)

The proceedings in which appellants would intervene had a single purpose: to fashion a divestiture decree in obedience to the mandate of this Court entered upon a record and contentions made by the United States under Section 7.

None of the appellants attempted to intervene in the case before judgment, and we submit that none was entitled to do so. Federal Rule 24(c) requires that a motion to intervene "be accompanied by a *pleading* setting forth the claim or defense for which intervention is sought." None of the appellants filed anything remotely resembling any "pleading" or "claim". The procedure prescribed in the Rule thus appears to contemplate intervention in an action before judgment, not in relation to *relief* to which a party has already demonstrated its right. This is doubtless the reason that intervention "after judgment is unusual and not often granted." *Basle Theatres, Inc. v. Warner Bros. Pitcures Dist. Corp.*, 24 F.R.D. 476, 477 (W.D. Pa.), citing 4 Moore's Federal Practice § 24.13.

The authorities already discussed necessarily hold that a private party may not sue under Section 7 for claimed injury to the public alone. *Compare* 15 U.S.C. § 25 *with* 15 U.S.C. § 26. From this proposition it follows *a fortiori* that a private party may not make the more extreme claim of a right to dictate the scope of antitrust relief in a case brought and won by the Attorney General on behalf of the United States. As recently as *United States v. du Pont & Co.*, 366 U.S. 316, 334, the Court observed that "once the government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." Relief is the heart and purpose of the government's suit, see *Du Pont, id.* at 328 *et seq.* Surely the

United States cannot be required to stand aside for private parties on relief issues after it has prevailed on the merits.[15]

B. Appellants Ought Not to Be Entitled to Obtain Review of The Stipulated Decree

Appellants have appealed solely from the orders denying their petitions to intervene; none has perfected any appeal from the stipulated decree itself. Mr. Bennett and Cascade took and perfected their appeals now before the Court before the decree was entered (R. 1398, 1524).[16] Edison

---

15. Appellants were invited by the district court to comment and offer assistance in the divestiture hearings, despite denial of their petitions to intervene. On the same day the district court informed the would-be intervenors their petitions would be denied, the court said to them (R. 830):

> "... I hope there will be nobody who will feel unwelcome here. I do welcome your presence and I should hope that if you had something you thought would be a contribution and of some assistance to the Court that you would have no hesitation in approaching us about that, either here in the court room or orally or by written memorandum.
>
> "I said somewhere along the line last week that there is quite an aggregation of talent here; and if there is any help that you can give the Court, the Court will welcome that."

Appellants and the other petitioners, in addition to this opportunity, were invited to comment upon the stipulated decree after it had been filed (R. 2024-2025) and at the hearing at which the decree was presented to the district court they were again given an opportunity to be heard (R. 2117-2131) and to examine witnesses (R. 2113-2115).

16. On July 16, 1965, Mr. Bennett filed a notice of appeal in the district court (R. 2196) purporting to appeal from the decree itself. By that time he had docketed the appeal now before the Court from the order denying his petition to intervene, he had filed a jurisdictional statement on that appeal, and it had been assigned a number by the Clerk. After filing his notice of appeal from the decree below, Mr. Bennett took no further action with respect to it. His appeal from the decree has not been docketed or otherwise perfected in this Court and it therefore stands abandoned.

appealed after entry of the decree but solely from the order denying it intervention (R. 2201-2202).

Each appellant nevertheless claims the right to attack and set aside the decree. Mr. Bennett calls upon this Court to fashion a new decree itself and refer its enforcement to a master or the court below (Bennett Br. 19); Cascade contends that this Court should either modify the stipulated decree in particulars specified by Cascade or declare the decree a nullity and remand for further proceedings in which Cascade would be an intervenor party (Cascade Br. 42-43); Edison "presuppose[s] that this Court would formally cancel and nullify the Decree" and remand (Edison Br. 52-53).[17]

It is inescapable that if any of the appellants were entitled to be an intervenor party, the decree stipulated between El Paso and the United States is a nullity for lack of approval by all those entitled to be parties, and in that event there would be nothing before the Court to review. If none of the appellants was entitled to intervene, we submit the Court has no controversy before it on which appellate jurisdiction to review the decree could rest.

Each appellant finds jurisdiction to review the decree, whether or not anyone was entitled to intervene (Bennett Br. 3; Cascade Br. 3; Edison Br. 3), in the decisions of this Court in *Continental Co. v. United States*, 259 U.S. 156, and *United States v. du Pont & Co.*, 366 U.S. 316. Appellants say these decisions stand for the proposition that this Court has a plenary power to review any decree

---

17. Oregon now asserts that El Paso should divest itself of gas supplies in the *Aneth field*. Counsel concede that this is a totally "different position" from what was stated to the district court and defend their "change in position in this brief" by claiming it rests on matters of which they are only "now aware." (Oregon Br. 5, 6, 8).

fashioned to comply with a divestiture mandate and to determine whether or not the decree does comply. But the decisions each say that such review is available only where the decree is brought to this Court "in any proper way" (*du Pont*, 366 U.S. at 325; *Continental Co.*, 259 U.S. at 166). We think this means that the Court's appellate jurisdiction may be invoked only by a genuine controversy between the *parties* to the action. Such was the case in both *Continental* and *du Pont*, since both came to the Court on appeals by parties. In *Sutphen Estates v. United States*, 342 U.S. 19, 22, where a would-be intervenor sought to attack a consent decree reorganizing Warner Brothers for antitrust purposes, the Court held:

> "*We do not pass here on the fairness of the plan of reorganization.* Cf. *Continental Co. v. United States*, 259 U.S. 156. We hold only that appellant has not maintained the burden of showing that under Rule 24(a)(3) it may intervene as of right."

As held in *Swift & Co. v. United States*, 276 U.S. 311, 323-324:

> "Under the English practice a consent decree could not be set aside by appeal or bill of review, except in case of clerical error. *Webb v. Webb*, 3 Swanst. 658; *Bradish v. Gee*, 1 Amb. 229; *Daniell*, Chancery Practice, 6th Am. ed., *973-974. In this Court a somewhat more liberal rule has prevailed. Decrees entered by consent have been reviewed upon appeal or bill of review where there was a claim of lack of actual consent to the decree as entered, *Pacific R.R. Co. v. Ketchum*, 101 U.S. 289, 295; *White v. Joyce*, 158 U.S. 128, 147; or of fraud in its procurement, *Thompson v. Maxwell Land Grant Co.*, 168 U.S. 451; or that there was lack of federal jurisdiction because of the citizenship of the parties. *Pacific R.R. Co. v. Ketchum, supra.* Compare *Fraenkl. v. Cerecedo*, 216 U.S. 295. *But 'a decree, which appears*

by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause.'"

Assuming, as we submit, that the United States and El Paso are the only parties to the action, there is no controversy between them. The dispute which supported review of the judgment for El Paso on the merits has been erased by a stipulation negotiated at arm's length.

The Attorney General's exclusive authority to represent the United States in district court proceedings to enforce the antitrust laws necessarily includes the power and authority to settle. The Court held in *Swift & Co. v. United States*, 276 U.S. 311, 331-332:

> "Finally, it is urged that the decree is void, because the Attorney General had no power to agree to its entry. Compare *Kelly v. Milan*, 127 U.S. 139, 159. The argument is that the utmost limit of his authority was to agree to a decree which would prohibit the defendants from doing specific acts which constitute contracting, combining, conspiring or monopolizing in violation of the anti-trust law; that he was without authority to enter into a contract by which citizens of the United States were prohibited absolutely and forever from engaging in the lawful business of conducting stockyards, storage warehouses, or the manufacture and distribution of many named food and other products, and by which many corporations and individuals would be forever taken out of the field of competition with others engaged in the same lines of business. Whether it would follow that the defendants are entitled to have the decree vacated because of such lack of authority, we need not decide. For we do not find in the statutes defining the powers and duties of the Attorney General any such limitation on the exercise of his discretion as this contention involves. His authority to make determinations includes the power

to make erroneous decisions as well as correct ones. Compare *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 278-280; *Noble v. Union River Logging R.R. Co.*, 147 U.S. 165; *Kern River Co. v. United States*, 257 U.S. 147, 155; *Ponzi v. Fessenden*, 258 U.S. 254, 262."

After termination of the proceedings and hearings relative to formulation of a decree of divestiture in this case, El Paso entered into an agreement with the United States relying upon the authority of the Attorney General to make a binding stipulation for judgment. In so doing, it relied upon his authority to speak for the government in the prosecution of the litigation and disposition thereof by settlement or otherwise. It relied upon the decisions of this Court and other decisions upholding the power of the Attorney General to exercise final authority in behalf of the United States. It did so in the hope and expectation that it would terminate this protracted litigation.

But its labors to accomplish this end have been frustrated by efforts of numerous intervenors to become parties to the suit and these appeals. The result is that through no fault of El Paso a prompt decree has become impossible. If these appeals are sustained and it is held these appellants are entitled to intervene, then it is clear that El Paso could not have relied upon any agreement with the Attorney General to dispose of the litigation. It will not, in the future, be able to do so without the concurrence of the appellants here and *all* others similarly situated.

Despite our conviction that no appellant has any right to intervene or invoke review of the stipulated decree, we feel obliged to reply to their attacks on its terms.

C. Appellants' Complaints About the Divestiture Decree Are Without Substance

The principal feature of the reorganization required by the divestiture decree is the creation of a powerful independent company to serve the growing natural gas markets of the Northwest region and to compete elsewhere for future increments of demand. Segregating El Paso's properties to accomplish these purposes was a task without precedent. Preparation of the plan and its approval by El Paso's security holders occupied the company's principal officers for nearly a year. It was the subject of court hearings until early 1966.

The assets, resources and present markets to be acquired by Northwest are of great magnitude. They include a net utility plant with a value of two hundred sixty-eight million dollars, subject to one hundred eighty million dollars in debt resulting from realignment of debt amounting to some eight hundred twenty-five millions, a pipeline system extending from the San Juan Basin to the Canadian border, and some seven and one half trillion cubic feet of gas—three trillion more than the former Pacific Northwest possessed.

The Attorney General, El Paso, its creditors and most of the petitioners to intervene below, including the California Public Utilities Commission (R. 2084-2085), agreed that the plan satisfies the public interest in antitrust relief and protects consumers in the markets to be served after divestiture by El Paso and Northwest.

The appellants here nevertheless persist in attacking the stipulated decree because it does not include certain changes in the plan which are relatively minor in comparison with its entire scheme. Yet adoption of any one of the revisions urged would suffice to brush aside the decree, vacate the

agreement of the parties and the consents of El Paso's creditors and return the matter to where it stood in April of 1964, when the Court ordered divestiture without delay.

In contrast to the minor character of the complaints measured against the magnitude of the plan, the *consequence* of their acceptance would be enormous to El Paso, the government and others, and that consequence would shatter any possibility for prompt divestiture in compliance with the mandate.

We take up each claim in turn.

1. THE CLAIM THAT EL PASO SHOULD BE DIVESTED OF ADDITIONAL GAS SUPPLIES IN THE SAN JUAN BASIN

Appellants claim that Northwest should have small additional quantities of San Juan gas totally insignificant when compared with the total assets to be transferred to Northwest under the decree. Yet revision of the plan in this respect would vitiate the agreement of the parties and the lenders' consents.

Under the decree Northwest will receive all gas reserves and supplies acquired by El Paso from Pacific Northwest (R. 149, 668) and *additional* supplies and reserves of three trillion cubic feet (R. 670, 696), a total of *seven and one-half trillion* cubic feet of gas (R. 699), which includes 285 billion cubic feet in the San Juan Basin over and above San Juan reserves possessed by Pacific Northwest (R. 755).[18]

Cascade and Edison now take up a contention, advocated by the government for a time below, that El Paso should

---

18. These supplies include, without taking into account the 285 billion feet in San Juan just mentioned and the additional Canadian gas El Paso contracted for after the decree was entered, 1.02 trillion cubic feet delivered at Kingsgate at the Canadian border and 1.69 trillion feet at the Big Piney and other Rocky Mountain areas (R. 755).

be required to divest itself of a small additional amount of gas in the San Juan Basin (Cascade Br. 19; Edison Br. 19).[19]

Cascade and Edison disagree with each other on what the additional quantity of San Juan gas should be. Both appear to contend that Northwest should have the same *percentage ratio* of San Juan reserves that Pacific Northwest had at the time of the acquisition. Edison computes this as 640 billion cubic feet (Edison Br. 22), only 355 billion cubic feet more than the 285 billion to be transferred (R. 755). Cascade asserts that the correct amount is 25.5% *of all El Paso's domestic dry gas property* (Cascade Br. 35). The record does not provide any means for determining the amount.

Cascade and Edison have used percentage computations for this purpose in which they compare reserve estimates which are not comparable.[20] Appellants' references to the fact (R. 951) that Northwest's *percentage* share of San Juan reserves will be slightly less than the *percentage* possessed by the former Pacific Northwest is an effort to blot out the fact that Northwest will have greater San Juan reserves than Pacific Northwest had together with all of the Rocky Mountain and Canadian gas available to El Paso.

The legal theory on which this claim rests depends upon appellants' speculations that Pacific Northwest *might have* acquired additional San Juan reserves, of the magnitude contended for, if El Paso had not acquired the company. We know of no authority for such a proposition and none is

---

19. Mr. Bennett, whose fellow California Public Utility Commissioners *approve* the division of reserves contemplated by the decree (R. 2084-2085), has simply adopted Edison's brief on this and other specific complaints now to be considered (Bennett Br. 15).

20. Certain of the gas reserve figures in the record and appellants' briefs are taken from earlier El Paso and Pacific Northwest reports which show reserves estimated by a "volumetric" method no longer used for evaluating reserves of the wells involved. After a

cited. *United States v. du Pont & Co.*, 366 U.S. 316; *Schine Theatres v. United States*, 334 U.S. 110, a Sherman Act case; and *Reynolds Metals Co. v. F.T.C.*, 309 F.2d 223 (D.C. Cir.), appear to us to hold against the contention.

The speculation on which appellants' legal theory rests is *itself* contrary to the evidence on the prior appeal, for the record shows the acquired company was in no position to add to its San Juan supplies. Pacific Northwest's Mr. Ray C. Fish testified that his company was obliged to spend "thirty to forty to fifty million dollars overnight" to develop San Juan reserves Pacific Northwest *then possessed* and "it was just impossible, I mean, to put our hands on that much money, and to put that much more money into the project of developing reserves when we could only get a trickle of gas out."[21] The exact amount required to develop Pacific Northwest's existing San Juan reserves was, as we have said, 35 million dollars, which *El Paso paid* and the benefit of which will be transferred to Northwest (R. 669-670).

Moreover, divesting additional San Juan reserves to Northwest would be senseless in light of present facts. The undisputed evidence is that the pipeline Northwest will operate cannot transport substantial additional quantities of gas in winter months—the only time it could be sold—from the San Juan Basin to the Pacific Northwest, a distance of over one thousand miles (R. 725). Enlargement of line capacity to enable Northwest to transport 150 million cubic feet of additional San Juan supplies over this dis-

---

field has been in production for a time, data becomes available permitting evaluation of reserves by the "pressure production decline" method. A government witness testified that volumetric figures and pressure production decline figures are "not comparable" (R. 793). El Paso's current figures in the record utilize the latter method, which is based upon experience and is more dependable than the volumetric method (R. 721).

21. Record on the prior appeal, to which we refer pursuant to stipulation (R. 735).

tance would require investment of some forty-nine million dollars (R. 634), failing which Northwest would be required to pay producers for San Juan gas it could not sell (R. 633).

We are at a loss to understand Cascade's present position because *Cascade itself* represented the true facts to the district court. Its memorandum supporting its claimed right to intervene (R. 342-443) asserted: (1) That the mandate did not require El Paso to divest itself of all the assets it received in the merger (R. 354); (2) that El Paso should retain the gas supplies in San Juan it had acquired in the merger because that gas could not be moved to Cascade's service area at a reasonable price and would "burden" the new corporation (R. 364-366, 367); (3) that any pipeline project to California mounted by the new corporation in the future would necessarily originate in Canada and utilize Canadian reserves (R. 365-366); and (4) that the new corporation should receive additional quantities of Canadian gas in preference to San Juan reserves and should also be relieved "of the burden" of additional plant and main transmission line "remote from its primary market area" through retention of those assets by El Paso (R. 365, 366-368).

On these appeals Cascade contends for the first time that El Paso should be compelled to divest additional reserves and related assets in line with its new concept that Cascade's function is to supplant the Attorney General in enforcing antitrust requirements of the mandate (Cascade Br. 27-28).[22]

---

22. Cascade admitted that the gas service contract with which it was concerned below was entered into "prior to the merger" with Pacific Northwest and that El Paso had simply "assumed" the agreement after the merger as a matter of corporate law (R. 70). Cascade pointed to no contract or other relationship between itself and El Paso. Since Cascade admits in this Court that Northwest meets Federal Power Commission "requirements for obtaining regulatory approval" and has "sufficient" gas and an adequate capital structure under Commission standards (Cascade Br. 13, 42), and

Each appellant seeks to buttress its San Juan gas contention (Cascade Br. 15-16; Edison Br. 20) with the bold claim that no divestiture plan could comply with the mandate unless it required Northwest to launch a court created project for service to California forthwith. Appellants are not satisfied with the undisputed fact that Northwest will be better equipped to mount such a project than Pacific Northwest ever was, if and when Northwest's management decides to do so; appellants appear to contend that such a management decision should be judicially made.

This construction of the mandate is a *non sequitur*. The Court stressed in *United States v. El Paso Gas Co.*, 376 U.S. 651, 660-1, that "Pacific Northwest's position as a competitive factor in California was not disproved *by the fact that it had never sold gas there*" and that "unsuccessful bidders are no less competitors than the successful ones" because "the presence of two or more supplies gives buyers a choice." This is to say that prospective competition protected by Section 7 arose from Pacific Northwest's mere presence in the market. Such a premise neither permits nor requires the conclusion that the new corporation created in divestiture launch an immediate project to California which Pacific Northwest had never been able to carry out.

As we have seen, transfer to Northwest of additional San Juan reserves would impose serious financial obligations on its part to take or pay for the gas. These costs would have to be borne either by Northwest's owners or by consumers in its present markets as a cost of service.

---

since it is undisputed that Northwest will have more gas and other assets than were enjoyed by the former Pacific Northwest with whom Cascade contracted, Cascade does not claim, nor could it claim, any injury from the decree (See *Sutphen Estates v. United States*, 342 U.S. 19).

Such additional San Juan supplies would be of no benefit to Northwest in serving its present markets and would make no significant contribution to a California project.

If and when an opportunity arises for Northwest to compete for new demands in the California market,[23] it would have available, as we have shown, more adequate reserves than were enjoyed by Pacific Northwest in Canada, to which, the prior record shows, Pacific Northwest looked to support its own project to California (R. 739, 742, 776, 806) and which Cascade contended below will be the source of any new project to the California market (R. 363-366).[24]

When and where Northwest should compete for new natural gas demands are not questions to be decided by any of these appellants, by El Paso, by the Department of Justice or the district court. The purpose of divestiture is to *equip* Northwest to compete whenever and wherever its management deems it feasible, and the matter is properly one for its own management. The stipulated decree serves that purpose and Northwest's chief executive officer testified that he is ready and able to make that decision after he is satisfied that the company is ready to compete for new demand. (R. 2115). In any event, no appellant proposes *any* of the specific ingredients required for a project to California or any other market.

---

23. The Court stressed on the prior appeal that in this industry antitrust competition exists only for new increments of gas demand. Dedication of gas and facilities to service of certificated public markets removes those markets from competition for antitrust purposes. *United States v. El Paso Gas Co.*, 376 U.S. 651, 659-660.

24. In the prior appeal the Court itself recognized that Pacific Northwest's hoped for plans to serve California would have utilized Canadian gas, not San Juan gas. *United States v. El Paso Gas Co.*, 376 U.S. 651, 661. The record on the prior appeal shows, in fact, that Pacific Northwest *refused* to include San Juan supplies in such a project (R. 206).

Finally, we stress a truth peculiar to this industry and its use of natural gas reserves. All of El Paso's reserves are dedicated to supplying natural gas markets in California and in the Pacific Northwest and Southwest regions. The reserves to be divested will be dedicated to serving the needs of consumers in the former Pacific Northwest's service areas. The gas reserve division between El Paso and Northwest is not a matter of private rivalry for profit between the two; it must take into account adequate provisions for the several market areas to be served immediately after divestiture by each company.[25]

A natural gas company is not permitted to earn a profit on gas itself; it is required to sell gas at its own cost, and earns only on its investment in facilities (Record on the prior appeal 204; *El Paso Natural Gas Co. v. F.P.C.*, 281 F.2d 567, 570 (5 Cir.), cert. den. 366 U.S. 912). To deprive El Paso of additional gas reserves would not deprive El Paso so much as the consumers in the markets to which El Paso's reserves are dedicated for public service.

2. THE CLAIM THAT EL PASO SHOULD CONTRIBUTE ADDITIONAL CAPITAL TO NORTHWEST

Next appellants claim that El Paso should be ordered to transfer additional capital to Northwest in the form of El Paso's shares in Westcoast Transmission Company (Cascade Br. 37; Edison Br. 26) and Edison alone would have El Paso contribute a further cash sum in respect of the

---

25. The gas reserves to be owned by El Paso and Northwest, respectively, after the asset transfer (but without taking into account the additional gas El Paso acquired for Northwest from Westcoast Transmission Company after the decree was entered), will have substantially identical reserve life indices and deliverability lives: Northwest's reserves will have a life index of 27.4 years and a 14 year deliverability life (R. 151-152); the reserves of El Paso will retain a life index of 26.8 years and a 14 year deliverability life (R. 151, 153).

claimed tax savings from Pacific Northwest's tax losses (Edison Br. 29).

Cascade has admitted, however, that Northwest's capital structure is adequate under Federal Power Commission standards (Cascade Br. 42), as counsel for the Commission reported to the district court (R. 1029, see R. 693-694), and both appellants choose to disregard the undisputed evidence that El Paso has invested nearly one hundred million dollars of its own funds in assets Northwest is to receive (*supra* pp. 10-11), that Northwest will be in a sound and "excellent" financial condition with good prospects for expansion (R. 172, 173-174) and that it is expected to earn in excess of seven million dollars per year at current rates (Def. Ex. A, R. 162, 1874). Nothing is said of the fact that the divestiture plan contained in the decree contemplates a bank borrowing by Northwest of five million dollars in contrast to Pacific Northwest's bank indebtedness of over *thirty-eight million dollars* (R. 621).

Contribution of additional capital to Northwest, at the expense of the markets El Paso must continue to serve, would not necessarily result in a Northwest project to California. We think it is common knowledge that large interstate pipe line companies devote their capital to a host of diversified activities unrelated to the gas business. If Northwest received additional cash, its management could invest it as management saw fit in other than pipeline activities; additional funds would not need to be used to serve California or any other gas market.

(a) Westcoast Transmission Company Stock

Having already contributed nearly one hundred million dollars in its funds for the benefit of Northwest, (*supra* pp. 10-11), El Paso is permitted by the decree to divest itself of its merger-acquired shares in Westcoast Transmission Com-

pany by sale to a purchaser or purchasers approved by the district court (R. 2176). Each appellant would have the shares transferred to Northwest as additional capital *and* to give Northwest equity power which could be brought to bear on Westcoast as one of Northwest's major suppliers (Cascade Br. 29; Edison Br. 28; Bennett Br. 15). But the government always contended below that ownership of Westcoast stock by Northwest would violate fundamental antitrust principles and that it would be required to *divest itself* of the shares for cash (R. 1071). The matter comes down to money.

When El Paso exchanged its own stock for that of Pacific Northwest, the price of Westcoast stock to El Paso in exchange was $29 per share (R. 629). At the time of the hearings below the market price for Westcoast stock was about $15 per share (R. 629), resulting in a loss to El Paso of some $15 per share.[26]

There is simply no showing of any need that this asset be contributed to Northwest in preference to permitting El Paso to retain whatever it can get for the shares—doubtless an amount less than it paid—in order to meet El Paso's own requirements.

(b) Tax Losses

What we have just said disposes of the claim made by Edison alone (Edison Br. 29) that El Paso should contribute a further sum to Northwest on the ground that Pacific Northwest's tax losses are to be deemed an asset from which El Paso benefited. There is no authority for such a theory. All of the decisions on the subject hold that the income tax liability of a consolidated corporate group is the result of

---

26. The fact that El Paso is required for tax purposes to carry Westcoast stock on its books at Pacific Northwest's cost of some $5 per share (R. 629) is, of course, beside the point.

a host of factors attributable to each of the members, and that a tax saving is simply the consequence of applying the revenue statute to given circumstances rather than an asset which can be bought or sold.[27]

3. THE CLAIM THAT TWO CONTRACTS BETWEEN EL PASO AND NORTHWEST SHOULD BE REVISED

Cascade and Edison each contend (Cascade Br. 36; Edison Br. 23) that two contracts between El Paso and Northwest, which are approved by the decree (R. 2174), should be revised; they make no complaint about two other intercompany contracts entered into in pursuance of the plan (R. 155-157, 167-168).

(a) San Juan Gathering Agreement

A gathering system is used in the natural gas industry to take gas from individual wells in a field and transport it ultimately to a pipeline (R. 157). Such systems are expensive (R. 158, 617). When Pacific Northwest began operations it was confronted with the necessity to construct such facilities in San Juan Basin at a huge expense, duplicating El Paso's existing system (R. 158, 617). To avoid this Pacific Northwest and El Paso entered into an agreement in 1956 under which each gathered gas in the San Juan Basin for the other (R. 157-159, 617-620).

The decree approves a gathering agreement between El Paso and Northwest (R. 2174). The new agreement specifies a charge of 4.5 cents per thousand cubic feet to be made by

---

27. See *Western Pac. R.R. Company v. Western Pac. R. Corp.*, 197 F.2d 994 (9 Cir.), reversed on other grounds, 345 U.S. 247, rehearing denied, 206 F.2d 495 (9 Cir.), cert. denied 346 U.S. 910; *Case v. New York Central Railway Company*, 19 A.D.2d 383, 243 N.Y.S.2d 620 (App. Div. 1st Dept.); *Alliegro v. Pan American Bank of Miami*, 136 So.2d 656 (Fla. Ct. App.) affirmed per curiam 149 So.2d 45 (Fla.).

each party for gas gathered for the other. The old agreement provided for a charge of 1.375 cents per thousand cubic feet (R. 158-159, 618-620). The 1956 agreement stated that the charge was intended to reflect the cost of service from time to time and therefore provided for changes as necessary to reflect actual costs (R. 158, 619-620). The 1956 agreement applied to a limited and specified geographic area and to only one geological formation embracing only 126 wells (R. 619). The new agreement will apply to a much larger area and to three geologic formations. The greater distances involved and the additional geologic formations necessarily increase the costs. Furthermore the new agreement will require El Paso to gather gas from nearly 1,000 Northwest wells (R. 617-619).

As a result El Paso's present cost of gathering gas in San Juan is 6.25 cents per thousand cubic feet (R. 724). A lesser charge of 4.5 cents per thousand cubic feet is specified in the new agreement in the expectation that increased use of El Paso's gathering facilities will ultimately reduce the cost of service to be comparable to the contract charge.

The proposed charge is the same as that negotiated at arm's length between El Paso and another company under a similar agreement for San Juan gathering, which itself provided a charge based upon cost of service[28] (R. 159, 620).

---

28. The 1.375¢ charge provided in the 1956 agreement is, as we have said, some 30% of El Paso's cost of service (R. 724). It is contemplated that El Paso would gather more gas for Northwest than Northwest would gather for El Paso (Gov. Ex. 7, R. 709, 1753). Imposition of the former charge on El Paso in comparison with the 4.5¢ charge approved by the decree would involve losses of over three million dollars during the first six years of performance (*Id.*, R. 1753), which would fall, of course, on consumers in California and the southwest served by El Paso.

Cascade and Edison both contend (Cascade Br. 27; Edison Br. 25) that the 1956 agreement should be "reinstated." But this is an illusion. What appellants mean is that El Paso should assume vastly increased gathering obligations at the same charge as was provided in the old agreement without increasing the charge to reflect cost of service. This would be confiscation, pure and simple. Finally, these charges will be subject to the jurisdiction of the Federal Power Commission (R. 159-160, 620).

(b) The Kingsgate Contract

Appellants take exception (Cascade Br. 28-29; Edison Br. 23-24) to the decree requirement (R. 2174) that El Paso transfer to Northwest a gas supply contract for sale by Westcoast Transmission Company of 1.02 trillion cubic feet of gas reserves (R. 755) to be delivered at Kingsgate, on the Canadian border (R. 622), at the rate of 150 million cubic feet daily at a 90% load factor (R. 1848-1862). The agreement requires El Paso for a period of five years to assume Northwest's obligation to take or pay for specified quantities of gas during the summer months, and obliges El Paso to return an equivalent quantity during the winter months at Northwest's option, to permit Northwest's increasing market demand to fully absorb the supply (R. 160-161, 626-627).

Appellants do not complain of this addition to Northwest's reserves, since the contract price is favorable and the reserves are in close proximity to the northwest market and afford access to potential reserves in Alberta (R. 160-161, 626-627). Instead, appellants claim that the contract should be revised to oblige El Paso to take at the Canadian border and pay for all gas delivered under the agreement which Northwest should elect for any reason not to take. Thus appellants, having first complained that Northwest

will not receive sufficient reserves in San Juan, now complain that the nearby Kingsgate reserve is in excess of Northwest's needs.

El Paso obtained the Kingsgate contract in 1960 at a cost of three and one half million dollars in its own funds to induce producers to sign (R. 150, 630). The notion that Pacific Northwest ever had a contract under which El Paso assumed such a take or pay obligation rests upon a misconception of government counsel in the early part of the proceedings below which appellants have carried forward into their briefs. In 1959 Pacific Northwest, then a subsidiary of El Paso, was seeking Federal Power Commission approval to import Kingsgate gas under contract arrangements later completed by El Paso (R. 624-626). To assist its subsidiary, El Paso filed with the Commission an "X-5 Tariff" (Gov. Ex. 8, R. 727, 1754-1768) offering to take or pay for any quantities of Kingsgate gas which its subsidiary could not use. The arrangement proved unnecessary and the proposed agreement was never executed (R. 622-623, 711-712). If El Paso had assumed such an obligation it would have been only a matter of bookkeeping.

To impose the arrangement contended for upon El Paso by decree would be confiscation. El Paso cannot be compelled, at the expense of its consumers in California and the southwest, to promote the future profits of its new competitor or assume the cost of supplying the northwest market with natural gas.

4. THE CLAIMS RESPECTING INDEPENDENCE OF NORTHWEST AND ITS MANAGEMENT

On this phase of the matter appellants would have the Court believe that Northwest would somehow be dominated by and subservient to El Paso. Nothing could be farther from the truth. This was the subject the Antitrust

Division deemed paramount, and it agreed to the decree only after the Antitrust Division was satisfied that there would be "complete economic separation between the two companies" to the end that Northwest will in fact "be separate and independent from El Paso" (R. 2132).

Appellants' contrary claims proceed in disregard of the provisions of the decree and the facts of record.

(a) Independence of Ownership

Mr. Bennett says that El Paso will "dominate" Northwest and "assert control" over it (Bennett Br. 17). He suggests an "outright sale" of Northwest stock to "third parties" (Bennett Br. 11), a method the decree already contemplates (R. 2176). Edison concedes that the provisions for exchange of Northwest stock for El Paso common "may pose no problem" (Edison Br. 36), since it parallels the divestiture method approved by the Court in *Continental Co. v. United States,* 259 U.S. 156, but goes on to criticize the decree provisions authorizing *public sale* of Northwest stock (Edison Br. 37, 38). Cascade accepts the decree provisions on stock divestiture and claims only that the periods of time provided should be shortened (Cascade Br. 37).

The decree permits El Paso to divest itself of the stock in Northwest it will acquire in exchange for transfer of the divested property in either of two ways (R. 2175-2176):

(1) within 18 months after transfer El Paso may distribute at least 80% of its shares in Northwest to holders of El Paso common who are willing to exchange their El Paso stock for Northwest shares *and who shall own no other El Paso shares after the exchange,* i.e., the "Reading formula" approved in *Continental Co. v. United States, supra;* or

(2) if El Paso does not divest itself of its stock by exchange, the shares are to be sold to the public

by public offering approved by the district court, but no owner of more than ½ of 1% of El Paso stock would be permitted to purchase any Northwest shares, and there are *further provisions* appellants do not mention prohibiting officers or directors of El Paso *and their families* from owning more than 1/10 of 1% of Northwest's stock (R. 2177-2178).

El Paso's common stock consists of some 23,000,000 shares held by 117,500 stockholders of record (Def. Ex. H, R. 639, 1904); 88% of the stockholders, some 103,000 of them, own 200 or less shares each (Def. Ex. B, R. 575, 1876). Only six El Paso common stockholders own as much as ½% of the company's total common and no individual shareholder owns as much as 1% (Def. Ex. C, R. 575, 1876-1877). 636-637, 1905-1906). The claim once made that 1,625 El Paso stockholders *of record* owned common shares in blocks of 1,001 shares or more (R. 883) was refuted (Def. Ex. R, R. 1203, 1927-2007). This group of shareholders includes 151 brokers, nominees and other institutions holding common shares owned beneficially *by not less than 20,450 different persons*, an average of not more than 509 shares each (*Id.*, R. 1925).[39]

Edison, approving the stock exchange feature as conforming with the "Reading formula" (Edison Br. 36), contends that, when and if El Paso divests by a *public sale*, members of El Paso's officers' and directors' families, or families of its larger stockholders, will join together and purchase enough Northwest stock to control (Edison Br. 35-38). Edison "does not suggest that this is what is actually

39. Edison asserts (Edison Br. 37), contrary to the undisputed record, that brokerage houses are each to be treated for this purpose as individual shareholders without regard to the more than 20,000 beneficial owners for whom they hold the shares.

planned or will be done" but does suggest "that the decree creates the 'possibility' that it might be done." (Edison Br. 38). The decree does no such thing.[30]

First, the decree provides that no officer or director of El Paso may purchase *any* of Northwest's stock if a public sale is had (R. 2176), and Edison overlooks the provisions of Section VI(C) of the decree (R. 2177-2178) that prohibits El Paso from having an officer or director whose *family* owns more than 1/10 of 1% of Northwest stock.

Second, the claimed "possibility" that families of El Paso stockholders would somehow join in purchasing a substantial block of Northwest stock is fanciful, as against the decree requirement that no one owning more than ½ of 1% of El Paso stock can purchase *any* Northwest stock (R. 2176). It is undisputed that only *six* El Paso shareholders own as much as ½ of 1% of its stock and no individual owns even 1% (Def. Ex. C, R. 575, 1876-1877); *they* cannot purchase (R. 2176), and the allegation that their families might combine to subvert the decree, a contention which has occurred only to Edison, is without substance.

(b) Independence of Northwest's Management.

Cascade and Edison each attack the conclusion of the Antitrust Division and the district court that Northwest's management will be independent of El Paso. Cascade, contrary to the record, calls the management "hand picked" (Cascade Br. 30), while Edison, shrinking from any suggestion that Mr. Clark "is anything but an honest and upright person" or "that there was any improper arrange-

30. In Mr. Bennett's brief we find no criticism of the stock exchange provisions, beyond a claim that they might delay divestiture, a subject we treat *infra*, pp. 49-50. It is Mr. Bennett's position that only persons "completely independent of El Paso" should be eligible to participate in a public purchase (Bennett Br. 18), and this, as we show in the text following, is what the decree does and does effectively.

ment", expresses its distrust (Edison Br. 35), despite its counsel's extensive cross-examination of Mr. Clark (R. 2113-2114), and his testimony that he can and will manage Northwest as an effective competitor (R. 2115).

Mr. Clark was examined in open court on June 24, 1965 by the parties and the court (R. 2101-2116) and the district court invited others present to participate (R. 2113, 2114, 2116). Counsel for Edison and the Oregon public utilities commissioner cross-examined Mr. Clark (R. 2113-2115), but neither took any exception to his appointment, expressed any view that he was not qualified and wholly independent of El Paso (R. 2117-2131) nor proposed anyone else. Neither Mr. Bennett nor Cascade appeared at all (R. 2087-2088). Appellants' contention is thus made for the first time on appeal.

This is a criticism unrelated to the decree itself. The decree provides simply for appointment and election of Northwest's officers and directors with the approval of the district court (R. 2174). It has nothing to say about who will be selected and approved, and in fact Northwest's management was installed by the district court in proceedings supplementary to entry of the decree itself (R. 2179-2180).

As shown earlier, *supra*, pp. 16-17, Mr. Clark's appointment as Northwest's chief executive had been under consideration by the district court for some time prior to his appointment (R. 2103); he had been proposed for the position after interviews by the Department of Justice (R. 2115, 2132, see 639); the Antitrust Division and the district court satisfied themselves of his complete independence of El Paso and his intention to have Northwest compete (R. 2103, 2115, 2132); and Mr. Clark has never had any association or connection with El Paso (R. 2102-2104). Mr. Clark selected

his directors independently of El Paso. Until revealed by him, they "were not even known" to El Paso. (R. 2107-2110).

5. THE CLAIM THAT THE DECREE UNDULY DELAYS DIVESTITURE

Apart from the fact that the decree contemplates as prompt and swift a divestiture as could be accomplished by any method, we think it ill behooves appellants to complain, as each does, about delay (Cascade Br. 37; Edison Br. 30, et seq.; Bennett Br. 17). El Paso's officers began sustained and intense efforts to comply with the mandate from the moment it went down (R. 827) until they had obtained the approval of El Paso's security holders, with the acquiescence of the Department of Justice (R. 143-144), a period extending into the fall of 1964 (R. 831-832). When that had been done and the matter was set for hearing on October 19, 1964 (R. 66-68), El Paso proceeded and remained ready to proceed in the district court without once seeking a continuance or delay. The delays that have occurred are not the making of El Paso, the Attorney General or the district court.

El Paso proceeded with all dispatch to seek Federal Power Commission approval of the necessary property transfers and certification for service to the northwest.[31] The Commission's decision to suspend its proceedings was not of El Paso's making; on the contrary El Paso opposed it. The complaint (Edison Br. 31) that divestiture of Northwest stock is unduly delayed by the necessity of a Federal Power Commission certificate is simply unavoidable if the requirements of the Natural Gas Act are to be respected.

---

31. See transcript of proceedings in district court on January 31, 1966, pp. 4-7 and transcript of August 4, 1966, pp. 3-6.

VI

CONCLUSION

The appeals should be dismissed.

Respectfully submitted,

GREGORY A. HARRISON

Attorney for Appellee
El Paso Natural
Gas Company

Of Counsel

ATHERTON PHLEGER
ROBERT S. DAGGETT
DAVID F. MACKIE
BROBECK, PHLEGER & HARRISON

LEON M. PAYNE
ANDREWS, KURTH, CAMPBELL & JONES

DENNIS MCCARTHY
VAN COTT, BAGLEY, CORNWALL
and MCCARTHY